IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 455 OF 1984

1. Sadashiv Namdeo Khandagale,
   At- Sonand, Tal. Sangola.

2. Mrs. Susabai Jalindar Kadam,
   At- Dondargaon, Tal. Sangola.

3. Mrs. Kamal Sadashiv Kashid,
   At- Sonand, Tal. Sangola.

4. Vimal d/o Namdeo Khandagale

5. Suman d/o Namdeo Khandagale

6. Krishnabai Namdeo Khandagale
   For herself and as a guardian
   of appellant Nos. 4 and 5,
   R/at Sonand, Tal. Sangola. ... Appellants
   (Ori. Defendants)

V/s

Balasaheb Krishna Khandagale
R/at Sonand, Tal. Sangola. ... Respondent
(Ori. Plaintiff)

Mr. M.R. Katikar for the appellants.

Mr. M.V. Sali for the respondent.

CORAM: P.V. KAKADE, J.
DATED: 9TH JUNE, 2005

ORAL JUDGMENT:

1. The appellant has preferred this appeal against the judgment and order passed by the Third Extra Assistant Judge, Solapur, dismissing his appeal and confirming the

order passed by the Civil Judge, Jr. Divn., Mangalwedha on 14.9.1981 decreeing the suit of the plaintiffs for specific performance of the contract between the parties.

2. The plaintiff brought the suit for specific performance of contract dated 5.6.1973. The suit land admittedly belonged to one deceased Namdeo Bapu Khandagale who died on 29.9.1973. Defendant Nos. 1 to 5 are the sons and daughters of deceased Namdeo and defendant No.6 is his widow. Deceased Namdeo was in need of money to meet the expenses for performing marriages of his daughters and for other household matters, therefore, he agreed to sale the suit land to the plaintiff-respondent for consideration of Rs.7,000/- and accordingly on 5.6.1973 deceased Namdeo executed an agreement of sale in favour of the plaintiff. After receiving the consideration of Rs.7000/-, sale deed was to be executed after obtaining necessary permission for sale, but during the pendency of the proceeding, Namdeo died. The respondent requested the appellants to bring permission and execute the sale deed as per the agreement of sale. He issued notice dated 28.10.1974 and called upon them to perform their part of the contract but the defendants did not comply with the

notice and on the other hand gave evasive reply to the notice and hence suit for specific performance of the contract and alternatively for refund of earnest money of Rs.7000/- was filed.

3. Defendant Nos. 1, 4, 5 & 6 resisted the suit claim by common written statement whereby they admitted that deceased Namdeo was the owner of the suit land and manager of the joint family. They denied that he was in need of money. They admitted the execution of agreement of sale dated 5.6.1973 in favour of the plaintiff but denied that Namdeo agreed to sell the land and received Rs.7000/- from the plaintiff. It was contended that deceased Namdeo received an amount of Rs.3,700/- only from the plaintiff. He further denied the terms of the agreement of sale and contended that as the agreement of sale was executed by deceased Namdeo in his personal capacity, it was not binding on them and they denied to execute the sale-deed in favour of the plaintiff and showed readiness to repay the amount of Rs.3,700/-. On this ground the suit was sought to be dismissed with costs.

4. On these pleadings, the learned Trial Judge proceeded to adjudicate the suit and on the basis of available evidence on record he came to the conclusion

that the plaintiff had proved execution of the suit agreement in his favour and he had paid the entire consideration of Rs.7,000/- to deceased Namdeo. It was further held that deceased Namdeo agreed to sale the suit land for anticedent debts, legal necessity and for the benefit of the joint family. It was also held that plaintiff had showed his readiness and willingness to perform his part of the contract. On the other hand, it was held that defendants were not in a position to establish that there was no full consideration and, therefore, the suit agreement was not be acted upon. Finally, the suit was decreed with order for specific performance of the suit contract.

5. The appeal was prferrred against the said judgment and order. The learned Addl. District Judge heard both sides and came to the conclusion that the reasonings adopted and the findings recorded were legal and proper and, therefore, it was not fit case for interference and hence dismissed the appeal. Hence the second appeal came to be filed.

6. It may be noted that, at the time of admission of this appeal, this Court formulated two substantial questions of law, namely, (i) whether the suit contract

was affected for want of mandatory compliance of Sec. 58(1)(c) of the Indian Registration Act for want of endorsement by the Sub-Registrar regarding the figure of consideration paid by the plaintiff to the defendants and the second point which was raised was to the effect that the evidence on record showed that, at the time of execution of the agreement, the only amount of Rs.5,000/- was paid and delivered in absence of endorsement contemplated by Sec. 58(1)(c) of the Indian Registration Act and still could do it be said that there was no failure of consideration.

7. At the outset, it may be noted that, in fact, both these questions are mixed questions of law and fact especially when the evidence on record is sufficient to establish that there is ample evidence before us to show that there was payment of full consideration and absence of separate endorsement by the Sub-Registrar on the document of agreement of sale would not vitiate the suit contract.

In support of this submission, the learned counsel for the appellant brought to my notice the provision of Sec. 58(1)(c) of the Indian Registration Act which stipulates as follows :-

> **"Sec.58(1):** On every document admitted to registration, other than a copy of a decree or order, or a copy sent to a registering officer under Sec.89, there shall be endorsed from time to time the following particulars, namely -
>
> (a) .....
>
> (b) .....
>
> (c) any payment of money or delivery of goods made in the presence of the registering officer in reference to the execution of the document, and any admission of receipt of consideration, in whole or in part, made in his presence in reference to such execution."

On the basis of this provision, it is submitted that it was mandatory for the Sub-Registrar to make an endorsement to the effect that the amount of Rs.7000/- was paid in his presence by the plaintiff to the defendants. The document at Exh.26 is the original

agreement of sale which reads that the amount of Rs.7,000/- was the consideration agreed upon. However, it is categorically mentioned at the end of the said document that, at the time of execution of the agreement the amount of Rs.7,000/- was received by deceased Namdeo and for which he had no complaint whatsoever. It is also pertinent to note that it has been signed by the Sub-Registrar, Sangola in proof of the fact that it was attested and signed by the concerned parties in his presence. In other words, though there is no separate specific endorsement to the effect that the amount of Rs.7,000/- was received in his presence, the very fact of the contents in the main body to that effect are seen to have been endorsed to by the Sub-Registrar Sangola which goes to show that the consideration of Rs.7,000/- was received by deceased Namdeo at the time of the execution for which deceased Namdeo had duly thumb marked the document and it was witnessed by other witnesses including the Sub-Registrar. In support of his contention, Mr. Katikar, the learned counsel for the appellant sought to put reliance on the ruling of Mysore High Court in the case of **Doddahalli Shivanegowda v/s District Registrar of Registration, reported in A.I.R. 1969 Mysore 360 (V 56 C 87)**. On perusal of this ruling, it is quite clear that it is not applicable to

the present case as it pertains to the scope of Sec. 72 of the Indian Registration Act and has no relevance to the issue at hand.

8. In the course of the argument, the learned counsel for the respondent brought to my notice various evidentiary aspects involved in this case including the fact that present appellant, son of deceased Namdeo was also present at the time of execution of the agreement. Moreover, it is pertinent to note that Namdeo died about one year after execution of the suit agreement dated 5.6.1973. However, during the said period of one year, he never made any grievance that he had not received full consideration at the foot of suit transaction. As against this, the plaintiff has specifically stated in his evidence that he had paid an amount of Rs.2,000/- to Namdeo in the village, whereas Rs.5000/- was paid at the time of agreement of sale and thereby he had made payment of Rs.7000/- which was the total consideration amount. It is significant to note that the suit agreement also does not say that the entire amount of Rs.7000/- was paid at the time of execution of the agreement, however, what is stated is that the entire consideration amount of Rs.7000/- was received till the date of execution of the suit agreement. Therefore, it

cannot be said that there was failure of payment of consideration only because the plaintiff had admitted the fact that the amount of Rs.2000/- was paid earlier and remaining amount of Rs.5000/- was paid at the time of execution of the agreement of sale.

9. This aspect apart, the learned counsel for the respondent put reliance on the provision of Sec. 92 of the Evidence Act. No doubt that Sec. 92 of the Evidence Act applies even to those cases where the terms of contract not required by law to be in writing have been so recorded. Where a document mentioning total consideration of Rs.7000/- having been received, it would not be open to the executant thereof having admitted execution to contend that there was a partial failure of consideration, which is prohibited by Sec. 92 of the Evidence Act. This view is supported by the ruling of this Court in the case of **Keshao Balasa Saoji v/s Shashikar Jankiram Saoji & anr., reported in 1983 Mh.L.J. 462.** This ruling is specially applicable to the present case when execution of the document is never challenged and in fact is admitted in categorical terms, nor the defendants have come with the case of total failure of consideration and, therefore, in my considered view, the provision of Sec. 92 of the

Evidence Act would not allow the defendants to raise any such contention of partial failure of consideration which is sought to be propogated.

10. For the reasons recorded above, therefore, it is clear that the reasoning adopted and findings recorded by both the Courts below are just, legal and proper and, therefore, would brook no interference. I therefore, hold that there was sufficient compliance to provisions of Sec. 58(1)(c) of Indian Registration Act when there is specific averment in the suit agreement that the amount of Rs.7,000/- was received by deceased Namdeo, to which the Sub-Registrar was present and has duly attested the document.

11. In the result, the appeal must fail and stands dismissed. In view of the facts and circumstances, the parties to bear their own costs.

12. At this stage, the learned counsel for the appellants sought stay of the decree. In this regard, it is to be noted that the matter pertains to the R.C.S. No. 29 of 1975 and the second appeal itself is of the year 1984. The decree is passed on merits and, therefore, I am of the considered view that no stay is

required to be issued in this case. Hence, plea for stay stands rejected. Writ to be sent to the Trial Court for necessary action.

(P.V. Kakade, J.)